

1 JENNIFER A. BECKER State Bar # 121319  
2 JOHN B. SULLIVAN State Bar # 238306  
3 LONG & LEVIT LLP  
4 465 California Street, Suite 500  
5 San Francisco, CA 94104  
6 TEL: (415) 397-2222 FAX: (415) 397-6392

7 [jabecker@longlevit.com](mailto:jabecker@longlevit.com) / [jsullivan@longlevit.com](mailto:jsullivan@longlevit.com)

8 Attorneys for Defendant  
9 MBH ARCHITECTS, INC. aka McNULTY  
10 BRISKMAN HEATH

11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 BOVIS LEND LEASE, INC. as assignee  
16 of LNR-LENNAR BRANNAN STREET,  
17 LLC,

18 Plaintiff,

19 vs.  
20 MBH ARCHITECTS, INC. aka  
21 McNULTY BRISKMAN HEATH and  
22 DOES 1 through 150, inclusive,

23 Defendant.

24 CASE No. C 07-05262 JSW

25 **MOTION FOR LEAVE TO FILE A THIRD  
26 PARTY COMPLAINT AGAINST LNR-  
27 LENNAR BRANNAN STREET, LLC**

28 Date: April 4, 2008

Time: 9:00 a.m.

Courtroom: Hon. Jeffrey S. White

29 **NOTICE OF MOTION**

30 PLEASE TAKE NOTICE that on April 4, 2008 at 9:00 a.m., or as soon thereafter  
31 as the matter may be heard in Courtroom 2 on the 17<sup>th</sup> Floor of the above-entitled Court, located  
32 at 450 Golden Gate Avenue, San Francisco, California, Defendant MBH ARCHITECTS, INC.  
33 ("MBH") will, and hereby does, move the Court for an order granting it leave to file a third party  
34 complaint against LNR-LENNAR BRANNAN STREET, LLC ("Lennar"). A true and correct  
35 copy of the proposed third party amended complaint is attached as Exhibit A to this motion. This  
36 motion will be based on this Notice and Memorandum of Points and Authorities, the Declaration  
37

1 of John B. Sullivan, the pleadings and papers on file herein, and on any such other evidence as  
 2 may be submitted at the hearing of this motion.

3 **RELIEF SOUGHT**

4 Bovis Lend Lease, Inc. ("Bovis") filed the Complaint for Damages in this action  
 5 against MBH after Lennar assigned Bovis all of its rights and remedies against MBH arising out  
 6 the Professional Services Agreement between Lennar and MBH (the "Professional Services  
 7 Agreement"). (Declaration of John B. Sullivan ("Sullivan Dec."), ¶ 3, Ex. A.) Because of the  
 8 existence of an indemnity and attorney's fees provisions in the Professional Services Agreement,  
 9 MBH seeks leave to file a Third Party Impleader Complaint against Lennar to join it in this  
 10 lawsuit. A true and correct copy of the proposed Third Party Impleader Complaint is attached as  
 11 Exhibit A to this motion.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 The Complaint in this action was filed by Bovis, the general contractor of a  
 15 condominium complex located at 200 Brannan Street and One Federal Street in San Francisco,  
 16 CA (hereinafter referred to as "200 Brannan) against MBH, the architect of 200 Brannan.  
 17 However, Bovis' claims arise out of the Professional Services Agreement between Lennar, the  
 18 developed of 200 Brannan, and MBH. In settlement of a dispute between Lennar and Bovis,  
 19 Lennar assigned Bovis all of its rights and remedies against MBH arising out of the Professional  
 20 Services Agreement.

21 Based on the terms of the Professional Services Agreement, MBH is entitled to  
 22 indemnity from Lennar for all losses, costs, claims, damages, liabilities and attorneys' fees which  
 23 MBH incurs as a result of any negligent errors, acts or omissions of Lennar or any contractor or  
 24 subcontractor employed or retained directly by Lennar. MBH has begun to incur such costs and  
 25 attorney's fees in defense of this lawsuit. MBH is also entitled to its reasonable costs and  
 26 attorneys' fees to the extent it prevails on any claim brought by Lennar arising out of the  
 27 Professional Services Agreement.

1           Several of the factual and legal issues in this action will overlap with the factual  
 2 and legal issues in MBH's claims against Lennar. To avoid the waste of judicial time and  
 3 resources as a result of a separate action on these issues, this Court should allow MBH to implead  
 4 Lennar into this action, so that all of these claims can be settled at once.

5           **II. FACTUAL BACKGROUND**

6           Lennar was the developer of a condominium complex located at 200 Brannan  
 7 Street and One Federal Street in San Francisco, CA. (Sullivan Dec., ¶ 3, Ex. A, Complaint For  
 8 Damages, ¶3). Bovis was the general contractor on the project. (Sullivan Dec., ¶ 3, Ex. A,  
 9 Complaint For Damages ¶4.) On or about January 24, 2000, MBH and Lennar entered into the  
 10 Professional Services Agreement whereby MBH agreed, in consideration for payment of  
 11 \$2,511,000, by Lennar, to furnish and perform various professional services for the real property  
 12 and residential homes located at 200 Brannan. (Sullivan Dec., ¶ 3, Ex. A, Complaint For  
 13 Damages, ¶10, Ex. A.)

14           As a term and condition of the Professional Services Agreement set forth in  
 15 Paragraph 6.07, Lennar agreed to indemnify and hold harmless MBH from losses, costs, claims,  
 16 damages, liabilities and attorneys' fees which MBH incurs as a result of any negligent errors, acts  
 17 or omissions of Lennar or any contractor or subcontractor employed or retained directly by  
 18 Lennar. (Sullivan Dec., ¶ 3, Ex. A, Complaint For Damages, ¶10, Ex. A.)

19           Paragraph 7.02 of the Professional Services Agreement provides that "Should any  
 20 claim or action or proceeding be commenced between the parties hereto or their representatives  
 21 concerning any provision of this Agreement or the rights and duties of any person or entity in  
 22 relation thereto, the party prevailing in such action, claim or proceeding, as the case may be  
 23 whether by out of court settlement or final judgment, shall be entitled, in addition to other such  
 24 relief as may be granted, to the reasonable sum for attorneys' fees, expert witness and consulting  
 25 fees, court costs, and all other costs incurred in such action or proceeding and any other appeals in  
 26 connection therewith." (Sullivan Dec., ¶ 3, Ex. A, Complaint For Damages, ¶10, Ex. A.)

27           On June 12, 2007, an action was commenced in the Superior Court of the State of  
 28

1 California in and for the County of San Francisco, entitled Bovis Lend Lease, Inc., Plaintiff vs.  
 2 MBH Architects, Inc., as Case Number CGC07-464235. (Sullivan Dec., ¶ 3, Ex. A, Complaint  
 3 For Damages.) Based on a settlement of disputes between the two companies, Lennar assigned to  
 4 Bovis all of its rights and remedies against MBH and each of MBH's subconsultants arising out  
 5 of the Professional Services Agreement. (Sullivan Dec., ¶ 3, Ex. A, Complaint For Damages, ¶8.)  
 6 Bovis subsequently filed this action arising out of MBH's alleged failure to provide proper plans  
 7 and details for the Project, which allegedly delayed the completion of the project as well as  
 8 contributed to significant construction defect claims by the residents of 200 Brannan. (Sullivan  
 9 Dec., ¶ 3, Ex. A, Complaint For Damages.)

10 **III. LEGAL ARGUMENT**

11 **A. FRCP Rule 14 Provides For Impleader For Claims By A Defendant Against A**  
 12 **Third Party For Indemnification**

13 Federal Rule of Civil Procedure 14 provides:

14 At any time after commencement of the action a (defendant)...may  
 15 cause a summons and complaint to be served upon a person not a  
 16 party to the action *who is or may be liable* to the (defendant)...for  
 17 all or part of the plaintiff's claim against the defendant. (emphasis  
 18 and parentheses added)

19 The purpose of impleader is to promote judicial efficiency by eliminating the need  
 20 for defendant to bring a separate action against parties for secondarily or derivatively liable to the  
 21 defendant on account of plaintiff's claim. *Southwest Admin., Inc. v. Rozay's Transfer* (9th Cir.  
 22 1986) 791 F.2d 769, 777. Claims under Rule 14 are deemed "ancillary" to the plaintiff's original  
 23 claim against the defendant. *Owen Equipment & Erection Company v. Kroger* (1978) 437 U.S.  
 24 365, 376. Ancillary jurisdiction enables a federal court to adjudicate claims by defendants or  
 25 third parties arising from the same transaction or occurrence as a diversity or federal question  
 26 claim and which do not themselves meet federal jurisdiction standards. *Blake v. Pallan* (9th Cir.  
 27 1977) 554 F.2d 947, 956. Accordingly, no independent basis for jurisdiction is required.  
 28 Defendant can implead a third party who is a citizen of the same state as the defendant himself.  
*United States v. United Pacific Ins. Company* (9th Cir. 1973) 472 F.2d 792.

1                    Impleader and ancillary jurisdiction are commonly used for claims against a third  
 2 party for indemnification. *FDIC*, 134 FRD at 273, citing, *United States v. Twin Falls* (9th Cir.  
 3 1986) 806 F.2d 862, 867. Moreover, It need not be shown that the third party defendant is  
 4 automatically liable if the defendant loses the underlying lawsuit. It is sufficient if there is some  
 5 possible scenario under which the third party defendant may be liable for some or all of the  
 6 defendant's liability to plaintiff. *FDIC*, 134 FRD at 272.

7                    Here, MBH's main claim against Lennar is one for contractual indemnity based on  
 8 the language in the Professional Services Agreement entered into by the parties in January 2000.  
 9 The Professional Services Agreement provides that MBH is entitled to indemnity from Lennar for  
 10 all losses, costs, claims, damages, liabilities and attorneys' fees. MBH has already begun to incur  
 11 attorneys' fees and costs. (Declaration of John B. Sullivan, ¶\_\_.)

12                   Impleader is commonly used for such claims, and should be allowed in this case to  
 13 avoid the multiplicity of litigation that would result if MBH were forced to file a separate action  
 14 against Lennar for any losses, costs, claims, damages, liabilities and attorneys' fees which MBH  
 15 incurs as a result of any negligent errors, acts or omissions of Lennar or any contractor or  
 16 subcontractor employed or retained directly by Lennar. This policy is especially furthered in this  
 17 action because Bovis is suing MBH based on the contract entered into between MBH and Lennar  
 18 via an assignment of rights from Lennar. To not allow MBH to implead Lennar would encourage  
 19 two separate action based upon the same contract.

20                   **B. The Court Should Allow MBH To Implead Lennar Into This Action**

21                   Unless filed within ten days of the defendant's answer, impleader is allowed at the  
 22 discretion of the court. FRCP 14(a); *Irwin v. Mascott* (ND CA 2000) 94 F.Supp 1052, 1056. The  
 23 Court's decision will not be overturned on appeal absent an abuse of discretion. *Southwest*  
 24 *Admin., Inc. v. Rozay's Transfer* (9th Cir. 1986). Courts construe this rule liberally in favor of  
 25 allowing impleader because it is designed to reduce multiplicity of litigation. *Lehman v.*  
 26 *Revolution Portfolio L.L.C.* (1st Cir. 1999) 166 F.3d 389, 393 (District court "should allow  
 27 impleader on any colorable claim of derivative liability that will not unduly delay or otherwise

1 prejudice the ongoing proceedings"); *FDIC v. Loube* (ND CA 1991) 134 FRD 270, 272.

2 In deciding whether impleader is appropriate, courts balance the benefits afforded  
 3 by liberal third party practice against possible prejudice to the plaintiff and the third party  
 4 defendant, the complication of issues at trial, the merits of the third party complaint, and any  
 5 additional costs that may be incurred by the parties. *Irwin*, 94 F.Supp.2d at 1056.

6 In this case, Bovis' claims arise out of the Professional Service Agreement entered  
 7 into between MBH and Lennar. Thus, the issues at trial will not be complicated because many, if  
 8 not all, of MBH's defenses to Bovis' claims are intertwined with its claim for indemnity and  
 9 potentially for attorneys' fees against Lennar. For this same reason, the addition of Lennar to this  
 10 case will not lead to a significant increase of additional costs for the parties. Instead, it will  
 11 reduce the costs for the three parties because it will alleviate the need for another lawsuit by MBH  
 12 against Lennar for indemnity that will likely involve many of the same issues that will be litigated  
 13 in this action.

14 Therefore, this Court should allow MBH to implead Lennar into this action.

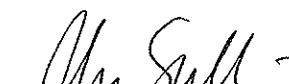
15 **IV. CONCLUSION**

16 For the foregoing reasons, this Court should allow MBH to implead Lennar into  
 17 this action.

18  
 19 Dated: February 25, 2008

LONG & LEVIT LLP

20  
 21 By



22 JENNIFER A. BECKER  
 23 JOHN B. SULLIVAN  
 24 Attorneys for Defendant and Third Party  
 Plaintiff MBH ARCHITECTS, INC. aka  
 McNULTY BRISKMAN HEATH

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## **EXHIBIT A**

1 JENNIFER A. BECKER State Bar # 121319  
2 JOHN B. SULLIVAN State Bar # 238306  
3 LONG & LEVIT LLP  
4 465 California Street, Suite 500  
5 San Francisco, CA 94104  
6 TEL: (415) 397-2222 FAX: (415) 397-6392

7  
8 jabecker@longlevit.com / jsullivan@longlevit.com

9 Attorneys for Defendant  
10 MBH ARCHITECTS, INC. aka McNULTY  
11 BRISKMAN HEATH

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

BOVIS LEND LEASE, INC. as assignee  
of LNR-LENNAR BRANNAN STREET,  
LLC,

Plaintiff,

vs.  
MBH ARCHITECTS, INC. aka  
McNULTY BRISKMAN HEATH and  
DOES 1 through 150, inclusive,

Defendant.

MBH ARCHITECTS, INC. aka  
McNULTY BRISKMAN HEATH,

Cross-  
Complainant,

vs.  
LNR-LENNAR BRANNAN STREET,  
LLC, and ROES, 1 through 150,  
inclusive,

Cross-  
Defendant.

CASE No. C 07-05262 JSW

**THIRD PARTY IMPLAIDER  
COMPLAINT FOR EXPRESS  
CONTRACTUAL INDEMNITY AND  
DECLARATORY RELIEF**

**DEMAND FOR JURY TRIAL**

Action Removed: October 16, 2007

Judge: Hon. Jeffrey S. White

Trial Date: April 20, 2009

Third Part Complainant MBH Architects, Inc. ("MBH") alleges:

1. MBH is and was at all times herein mentioned a citizen of the State of California.

2. On information and belief, LNR-LENNAR BRANNAN STREET, LLC (“Lennar”) is a California limited liability company.

3. MBH alleges that the true names and capacities, whether individual, corporate or otherwise, of third party defendants Roes 1 through 30 are unknown to MBH at the present time, who therefore sues said third party defendants by such fictitious names. MBH is informed and believes and thereon alleges that each of said third party defendants named herein as a Roe is legally responsible in some manner for the events and happenings herein complained of and thereby proximately caused the damages suffered by MBH and alleged in this cross-complaint. MBH will amend this third party impleader complaint to allege their true names and capacities when ascertained.

4. In doing the things herein alleged, third party defendants, and each of them, including ROE third party defendants, were the agents, employees, and/or representatives of each other and/or acting in the course and scope of said agency, employment and/or representation in the matters herein alleged.

5. The jurisdiction of the court over this subject matter is predicated on 28 U.S.C. §1332 in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs. Such jurisdiction existed at the commencement of the action and at the time this action was removed to Federal Court.

1                   6.       On or about January 24, 2000, MBH and Lennar entered into a written  
 2 contract (the "Contract") whereby MBH agreed, in consideration for payment of \$2,511,000, by  
 3 Lennar, to furnish and perform various professional services for the real property and residential  
 4 homes known as Brannan Square located at 200 Brannan Street in San Francisco, California  
 5 (hereinafter "Project") as summarized in the Contract attached to this Third Party Impelader  
 6 Complaint as Exhibit A. As a term and condition of this Contract set forth in Paragraph 6.07,  
 7 Lennar agreed to indemnify and hold harmless MBH from losses, costs, claims, damages,  
 8 liabilities and attorneys' fees which MBH incurs as a result of any negligent errors, acts or  
 9 omissions of Lennar or any contractor or subcontractor employed or retained directly by Lennar.

10                  7.       The Contract also provides that "Should any claim or action or proceeding  
 11 be commenced between the parties hereto or their representatives concerning any provision of  
 12 this Agreement or the rights and duties of any person or entity in relation thereto, the party  
 13 prevailing in such action, claim or proceeding, as the case may be whether by out of court  
 14 settlement or final judgment, shall be entitled, in addition to other such relief as may be granted,  
 15 to the reasonable sum for attorneys' fees, expert witness and consulting fees, court costs, and all  
 16 other costs incurred in such action or proceeding and any other appeals in connection therewith."

17                  8.       On June 12, 2007, an action was commenced in the Superior Court of the  
 18 State of California in and for the County of San Francisco, entitled Bovis Lend Lease, Inc.,  
 19 Plaintiff vs. MBH Architects, Inc., as Case Number CGC07-464235. According to the  
 20 Complaint, Lennar assigned to Bovis all of its rights and remedies against MBH and each of  
 21 MBH's subconsultants arising out of the Contract. Bovis subsequently filed this action arising  
 22 out of MBH's alleged failure to provide proper plans and details for the Project, which in turn  
 23 delayed the completion of the project as well as contributed to significant construction defect  
 24 claims by the residents of 200 Brannan

25                  //

26                  //

27                  //

28

**FIRST CAUSE OF ACTION**

9. MBH refers to and incorporates herein by reference the allegations of paragraphs 1 through 8 above.

10. MBH and Lennar entered into the Contract in which MBH agreed to furnish and perform various professional services. Under the terms of the Contract, Lennar agreed to indemnify and hold harmless MBH from losses, costs, claims, damages, liabilities and attorneys' fees which MBH incurs as a result of any negligent, errors, acts or omissions of Lennar or any contractor or subcontractor employed or retained directly by Lennar.

11. MBH furnished and performed such professional services.

12. Bovis has filed a Complaint in this action seeking damages arising out of such professional services, and encompassed by the aforementioned indemnity obligations.

13. By virtue of the above-described contracts and/or applicable law Lennar and Roes 1 through 150 must hold MBH harmless and indemnify it for the amount of any judgment or settlement, and for expenses, costs of suit, attorneys' fees and other damages and costs which MBH incurs in connection with this litigation as a result of any negligent, errors, acts or omissions of Lennar or any contractor or subcontractor employed or retained directly by Lennar.

14. MBH has incurred, and continues to incur, necessary and reasonable attorneys' fees and other legal costs in defending this action against Bovis. To the extent that MBH suffers any losses, costs, claims, damages, liabilities or attorneys' fees as a result of any negligent errors and/or omissions of Lennar or any contractor or subcontractor employed or retained directly by Lennar, MBH is entitled to all such losses, costs, claims, damages, liabilities and attorneys' fees from Lennar. The total amount of MBH's costs and attorneys' fees is not yet known and MBH will seek leave of court to insert such amount at the time of trial.

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**SECOND CAUSE OF ACTION**  
(Declaratory Relief)

15. MBH refers to and incorporates herein by reference the allegations of Paragraphs 1 – 14 above.

16. An actual controversy has arisen and now exists between MBH and Lennar concerning their respective rights and duties under the Contract concerning the costs and attorneys' fees provision of the Contract.

8                   17. On the one hand, MBH contends that Lennar is liable for a reasonable sum  
9 for attorneys' fees, expert witness and consulting fees, court costs, and all other costs incurred in  
10 this action or proceeding brought against MBH by Bovis in the event that MBH is determined to  
11 be the prevailing party on the contract. On the other hand, on information and belief, Lennar  
12 denies that it is liable to MBH for a reasonable sum for attorneys' fees, expert witness and  
13 consulting fees, court costs, and all other costs incurred in this action or proceeding brought  
14 against MBH by Bovis in the event that MBH is determined to be the prevailing party on the  
15 contract.

16                   18. MBH desires a judicial determination of its and Lennar's right and duties  
17 related to this provision in the Contract which allows for an award of reasonable sum for  
18 attorneys' fees, expert witness and consulting fees, court costs, and all other costs incurred to the  
19 prevailing party.

20                   19. A judicial declaration is necessary and appropriate at this time under the  
21 circumstances in order that MBH may ascertain its and Lennar's rights and obligations related to  
22 this provision in the Contract which allows for an award of reasonable sum for attorneys' fees,  
23 expert witness and consulting fees, court costs, and all other costs incurred to the prevailing party.

24 20. To date, MBH has begun to incur attorneys' fees, expert witness and  
25 consulting fees, court costs, and other costs related to this action by Bovis.

26 //

27 //

1 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them,  
2 as follows:

3 1. For a declaration that Lennar is liable to MBH for a reasonable sum for  
4 attorneys' fees, expert witness and consulting fees, court costs, and all other costs  
5 incurred in this action or proceeding brought against MBH by Bovis in the event  
6 that MBH is determined to be the prevailing party;  
7 2. For general damages according to proof;  
8 3. For reasonable attorneys' fees;  
9 4. For punitive damages;  
10 5. For costs of suit herein incurred; and  
11 6. For such other and further relief as the court may deem proper.

12  
13 Dated: February 26, 2008

LONG & LEVIT LLP

14 By

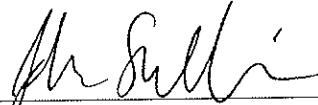
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16 JENNIFER A. BECKER  
17 JOHN B. SULLIVAN  
18 Attorneys for Defendant and Third Party  
19 Plaintiff MBH ARCHITECTS, INC. aka  
20 McNULTY BRISKMAN HEATH

21 MBH hereby demands trial by jury.  
22

23 Dated: February 26, 2008

LONG & LEVIT LLP

24 By

25   
26 JENNIFER A. BECKER  
27 JOHN B. SULLIVAN  
28 Attorneys for Defendant and Third Party  
Plaintiff MBH ARCHITECTS, INC. aka  
McNULTY BRISKMAN HEATH

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